

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ERNEST M. YOUNG, OFFICER OF HI LITE WINES AND LIQUORS, INC.	:	DETERMINATION
	:	
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1981 through February 29, 1984.	:	

Petitioner, Ernest M. Young, officer of Hi Lite Wines and Liquors, Inc., P.O. Box 1039, Ridgefield, Connecticut 06877, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1981 through February 29, 1984 (File No. 805934).

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on September 13, 1989 at 2:45 P.M., with all briefs filed by December 22, 1989. Petitioner appeared by Steven S. Goodman, C.P.A., and Lawrence W. Levy, Esq. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect tax on behalf of Hi Lite Wines and Liquors, Inc. during the period in issue pursuant to Tax Law § 1131(1) and, therefore, personally liable for the sales tax, penalty and interest due from the corporation for said period pursuant to Tax Law § 1133(a).

FINDINGS OF FACT

On September 20, 1984, the Division of Taxation issued to petitioner, Ernest M. Young, as an officer of Hi Lite Wines and Liquors, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due setting forth total tax due of \$61,358.07, penalty of

\$13,066.04 and interest of \$16,423.24, for a total amount due of \$90,847.35 for the period March 1, 1981 through February 29, 1984. On May 13, 1988, the Bureau of Conciliation and Mediation Services issued a conciliation order which reduced the tax, penalty and interest due for the period March 1, 1981 through August 31, 1982 as assessed against Ernest M. Young to zero and which also reduced the amount of tax, penalty and interest assessed against petitioner for the period September 1, 1982 through February 29, 1984 to \$12,208.18, plus penalty and statutory interest.

Hi Lite Wines and Liquors, Inc. was a New York corporation which operated a retail wine and liquor store at 253 West 72nd Street in New York City. The corporation was owned by one Helen Herschorn, who was president and 100 percent stockholder of the corporation up until the time of her death on July 26, 1982. On August 30, 1982, Ernest M. Young, petitioner herein, was appointed executor of the estate of Helen Herschorn by the Queens County Surrogate's Court.

During the period preceding Mrs. Herschorn's demise and for the subsequent period until the closing of the store in 1984, her son, Alan Hunter, managed the store or was the direct supervisor of the store manager. Mr. Hunter was not an officer of the corporation. The Federal income tax returns, Forms 1120, filed on behalf of Hi Lite Wines and Liquors, Inc. indicate the history of the shareholders in the business. For the fiscal years ended July 31, 1981 and 1982, the Federal income tax returns indicate that Helen Herschorn was the sole stockholder of the business. However, the Federal income tax returns for the fiscal years ended July 31, 1983 and 1984 indicate that there were four new officers with various stock ownerships. For both periods the officers were listed as E. M. Young, A. E. Hunter, N. Underwood and D. Levasseur. Stock ownership was listed as 33% for A. E. Hunter, N. Underwood and D. Levasseur. Both returns also indicate in their schedule E that E. M. Young, A. E. Hunter and N. Underwood devoted part of their time to the business, while D. Levasseur devoted no time to the business.¹

¹This last fact was contradicted by testimony at hearing which revealed that Ms. Levasseur occasionally worked in the store as a clerk.

Sometime after his appointment as executor of the estate of Helen Herschorn on August 30, 1982, Ernest M. Young applied to the State Liquor Authority for an "Approval of Corporate Change" indicating that he was executor of the estate of Helen Herschorn, that he had assumed the office of president and director of Hi Lite Wines and Liquors, Inc. and that he owned five shares of stock. The Notice of Approval of Corporate Change received by the corporation on May 18, 1983 also indicated that Norma Underwood was secretary, treasurer and a director of the corporation. Other than on the application, the record does not indicate that Mr. Young was ever elected president or director of the corporation or that he owned stock in the corporation.

It appears that no shares of stock of the corporation were ever transferred to petitioner by virtue of the fact that all of Mrs. Herschorn's

assets, including her 100% stock ownership in the corporation, passed to her three heirs, to wit: Alan Hunter, Norma Underwood and Deborah Levasseur.

After Mrs. Herschorn's death on July 26, 1982, petitioner assumed the decedent's duties with regard to Hi Lite Wines and Liquors, Inc. and held himself out to creditors, the Division of Taxation and other taxing authorities as president of the corporation. He signed all checks and payroll, sales and occupancy tax returns. He also signed a consent to extend the period of limitation on assessment as president of the corporation.

Alan Hunter, the decedent's son, managed the store on a day-to-day basis during the decedent's final illness and continued to do so shortly after her death. He then appointed another store manager, Ron Hess, to operate it on a daily basis. Petitioner acquiesced in these business decisions.

Both Mrs. Underwood and Mrs. Levasseur worked at various times as sales personnel in the operation of the business.

At most times relevant herein, the corporation employed a bookkeeper, Mrs. Herschorn's

sister, Edna Legon, who handled the daily and weekly bookkeeping duties of the corporation. Mrs. Legon accumulated the information from the daily cash receipt reports and prepared for payment all the invoices sent to her by the store manager. Checks, previously signed by petitioner, were made out to the various creditors and mailed.

The accounting firm of Ernest M. Young, C.P.A., P.C. or its successor firm, Marinan and Young, reviewed the corporation's Federal income tax returns during the years in issue.

CONCLUSIONS OF LAW

A. Tax Law § 1133(a) provides that every person required to collect tax imposed by Article 28 shall be personally liable for the tax imposed, collected or required to be collected under said article. Tax Law § 1131(1) defines "persons required to collect tax" as every vendor of tangible personal property or services, including any officer or employee of a corporation who as such officer or employee is under a duty to act for such corporation. Therefore, the critical question presented in this case is whether Ernest M. Young was an officer of Hi Lite Wines and Liquors, Inc. who was "under a duty to act for such corporation."

B. This case presents an unusual set of circumstances involving the duties and obligations of a de facto officer who also happens to be the executor of the estate of a decedent who was the president of the corporation in question during a portion of the audit period.

It has been held that the acts of de facto officers are binding on a corporation with respect to third persons who rely upon the apparent authority of such de facto officers (Matter of Ringler and Co., 204 NY 30; Petition of Salnor Realty Corp., 16 Misc 2d 189, 183 NYS2d 879). In the instant matter, petitioner held himself out as president of Hi Lite Wines and Liquors, Inc. and truthfully believed himself to be president thereof. He signed various tax returns, checks and consents to extend the period of limitation on assessment as president of the corporation and led various creditors, taxing authorities and the State Liquor Authority to believe that, in fact, he was president of the entity. Therefore, for the purposes of this matter, it is deemed that petitioner may be held as a responsible officer of the corporation if the facts so dictate.

As fiduciary of the estate of Helen Herschorn, petitioner was under a duty to be faithful, diligent and prudent in his administration of the estate (King v. Talbot, 40 NY 76). Further, although a fiduciary is not an insurer of the safety of the estate entrusted to him, he must demonstrate in respect to the conduct of the affairs of the estate the careful and persevering effort which the average industrious man of intellect and caution would display in the conduct of his own affairs of a similar nature, in addition to displaying good faith (In re Cohen's Will, 13 Misc 2d 694, 177 NYS2d 344, mod 9 AD2d 916). Therefore, it can be inferred that petitioner had a duty to the corporation to preserve and protect its assets. By analogy to the case of Matter of Estate of Kahr (85 Misc 2d 363, 379 NYS2d 638), where an attorney was found to have a greater fiduciary duty to an estate than a non-attorney executor, it could be said that Mr. Young, as a certified public accountant, could be held to a higher fiduciary duty than a non-certified public accountant executor.

C. It has been held that whether a person is an individual required to collect tax depends on the particular facts of each case (Stacy v. State, 82 Misc 2d 181, 183; 20 NYCRR 526.11[b][1], [2]). Although it has been held that the holding of corporate office does not, per se, impose liability upon the holder (see, Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427), the question in the instant case becomes whether or not petitioner could delegate all of the duties of the corporation to others while controlling the corporation's purse strings and assuming responsibility for signing all tax returns on behalf of the corporation.

Among the relevant factors considered in determining whether a person has a duty to act for the corporation are: authorization to sign the corporate tax returns, responsibility for management or maintenance of the corporate books, authorization to hire and fire employees, and derivation of substantial income from the corporation or stock ownership (Matter of Zefania Baumvoll, as Officer of Jaz Service Center, Inc., Tax Appeals Tribunal, November 22, 1989).

The fact that an officer fails to exercise his share of the responsibility does not operate to shed him of liability since "corporate officials responsible as fiduciaries for tax revenues cannot absolve themselves merely by disregarding their duty and leaving it to someone else to

discharge" (Matter of Blodnick v. State Tax Commn., 124 AD2d 437, 507 NYS2d 536, 538). Surely in the instant matter, given the totality of the circumstances, including petitioner's status as a fiduciary of the decedent's estate charged with the duty of protecting and preserving the assets of the estate, he cannot deny his involvement in or knowledge of the business. (See, In re Cohen's Will, supra.) There were other avenues open to petitioner whereby others might have been appointed officers of the corporation but he chose to assume the duties of president, naming himself as such on the Notice of Corporate Change with the State Liquor Authority, signing all checks to creditors and taxing authorities, and signing various tax returns. He also was cognizant of the business operations and acquiesced in the business decisions made in its behalf, as was his duty as both president of the corporation and as fiduciary of the estate. The latter position underscored his mandatory involvement.

These activities and petitioner's fiduciary obligations to the estate require a finding that he was a person under a duty to act for the corporation and therefore personally liable for the tax imposed.

D. The petition of Ernest M. Young, as officer of Hi Lite Wines and Liquors, Inc., is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to him on September 20, 1984, as modified by the Bureau of Conciliation and Mediation Services (see Finding of Fact "1" above), is sustained together with penalty and such additional interest as may be lawfully owing.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE